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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 387

DELTA AIR LINES, INC.,
Petitioner,

v.

W. SAM EDWARDS, Administrator c. t. a. of the Estate of Marion H. Allen, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

JAMES N. FRAZER,
RICHARD S. MAURER,
WILLIAM LINKOUS, JR.,
ELLIOTT GOLDSTEIN,
Attorneys for Petitioner.

Of Counsel:
POWELL, GOLDSTEIN, FRAZER & MURPHY,
1130 Citizens & Southern National Bank Building,
Atlanta 3, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion	1
Jurisdiction to review	2
Question presented	2
Statutes involved	2
Statement of the case	3
Reasons for granting the writ	6
Argument	8
Conclusion	14
Appendix	15
Certificate of service	24

Cases Cited.

Baird v. Commissioner, ... F. 2d ..., decided June 20, 1958 ..... 6, 8

Continental Tie & Lumber Co. v. United States, 286 U. S. 290 ..... 6, 8, 10, 11, 12, 14

Delta Air Lines v. Summerfield, 347 U. S. 74 ..... 11, 12

Glover v. Commissioner, 253 F. 2d 735 9

Hansen v. Commissioner, ... F. 2d ..., decided August 4, 1958 9

Johnson v. Commissioner, 233 F. 2d 952 9

Keasbey & Mattison Co. v. U. S., 141 F. 2d 163 9

Schaeffer v. Commissioner, ... F. 2d ..., decided August 20, 1958 ..... 6, 8, 10

Texas Trailercoach, Inc., v. Commissioner, 251 F. 2d 395 ..... 6, 8, 9, 10, 11

Statutes Cited.

Sections 41 and 42 (a), Internal Revenue Code of 1939 [26 U. S. C. 1952 Ed., Secs. 41, 42 (a)] 2, 10, 11
Section 401 (e) (1), Civil Aeronautics Act 3
Sections 405 and 406, Civil Aeronautics Act of 1938 (49 U. S. C. 1952 Ed., Secs. 485, 486) 2, 3, 11, 12
Section 727 (h), Internal Revenue Code of 1939 [26 U. S. C. 1952 Ed., Sec. 727 (h)] 2
Section 1340, Judicial Code (28 U. S. C., Sec. 1340) 5
28 U. S. C., Sec. 1254 (1) 2

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

The petitioner prays that a writ of certiorari be issued to review a judgment and order of the United States Court of Appeals for the Fifth Circuit, reversing the judgment of the United States District Court for the Middle District of Georgia in favor of petitioner, and rendering judgment for the respondent.

OPINION.

The opinion of the District Court is reported in 150 F. Supp. 589. The opinion is found at page 77 of the printed record. The opinion of the Court of Appeals for the Fifth Circuit is reported at 255 F. 2d 501. A copy of its opinion and judgment are appended hereto.

JURISDICTION TO REVIEW.

The date of the order and judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed is May 23, 1958 (R. 154).

The date of the order denying a petition for rehearing is June 24, 1958 (R. 165). No extension of time to petition for certiorari has been applied for.

The statutory provision believed to confer jurisdiction on the Court to review the judgment of the Court below on writ of certiorari is 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether, for purposes of computation of World War II excess profits tax, an air carrier may include in base period net income sums paid it in a later year, pursuant to a determination of the Civil Aeronautics Board, as fair and reasonable compensation for the carriage of mail during the base period.

STATUTES INVOLVED.

The statutes involved are Sections 41 and 42 (a) of the Internal Revenue Code of 1939 [26 U. S. C. 1952 Ed., §§ 41, 42 (a)], Section 727 (h) of the Internal Revenue Code of 1939 [26 U. S. C. 1952 Ed., § 727 (h)], and Sections 405 (a) and 406 of the Civil Aeronautics Act of 1938 (49 U. S. C. 1952 Ed., §§ 485, 486). The statutory provisions are appended hereto.

STATEMENT OF THE CASE.

Petitioner, Delta Air Lines, Inc., hereafter called "Delta," is an air carrier of passengers, freight and mail. On December 1, 1939, the Civil Aeronautics Authority, under the provisions of Section 406 of the Civil Aeronautics Act of 1938, 49 U. S. C., § 486 (hereafter called "the Act"), instituted upon its own initiative a proceeding to determine whether the compensation being paid to Delta for transporting mail was fair and reasonable (R. 52). The compensation then being paid to Delta, under a contract with the Postmaster General, as fixed by the Interstate Commerce Commission, was a rate of twenty-nine cents per airplane mile for transporting a mail load not exceeding 300 pounds with a base mileage of 105,000 miles per month (R. 53). Pending the fixing of fair and reasonable rates by the Civil Aeronautics Authority, the Act provided that prior contracts for mail carriage should be continued on a temporary basis (R. 51). Section 405 (a) of the Act provided that, after passage of the Act in June, 1938, each contract with an air carrier for the carriage of mail should be cancelled upon issuance to the holder of such contract of a certificate of public convenience and necessity authorizing the transportation of mail by aircraft between the points covered by the contract. Under the provisions of Section 401 (e) (1) of the Act a certificate of public convenience and necessity was awarded to Delta for its route No. 24 on February 25, 1939. Section 405 (a) of the Act further provided that until the Civil Aeronautics Authority fixed rates under Section 406 of the Act, the Postmaster General should pay compensation at the rate in effect at the time of the passage of the Act. Pursuant to this provision, Delta received payments for mail carried during the period commencing December 1, 1939, at the rate previously fixed by the Interstate Commerce Commission (R. 51).

For purposes of computing its income from the carriage of mail by air Delta since its organization consistently accrued and recorded in its records income from the carriage of mail by air in the month in which the mail was carried, rather than in the month in which pay was received by it from the United States of America. As of the end of each month, the mail pay properly accruable to it was computed by Delta by multiplying the "units of service" (the measure of mail carried) times the mail pay rate then current. The amount thus computed was added to income for that month, a corresponding amount being set up as an account receivable (R. 55). During the period of the mail rate proceeding, which included its fiscal year ending June 30, 1940, Delta's base period for computation of its World War II excess profits tax, Delta accrued its payment for the carriage of mail at the rate in effect prior to the passage of the Civil Aeronautics Act (R. 51). On January 29, 1942, the Civil Aeronautics Board, successor to the Civil Aeronautics Authority, promulgated an order fixing a mail rate for Delta's route No. 24 of thirty-one cents per pay mile for the period beginning December 1, 1939, and terminating July 14, 1941. The amount determined as being due to Delta for additional mail transportation pay for its fiscal year ending June 30, 1940 was $43,931.86. This amount was received by Delta during its fiscal year ending June 30, 1942 (R. 53, 54).

The determination of the amount of mail pay due Delta was a determination of the amount of pay necessary for the carrier to "break even" in its operations, and to allow it a standard return of eight per cent on its investment. No questions were raised by the Postmaster General, or discussed by the Civil Aeronautics Board in the proceedings to determine Delta's compensation with reference to the amount due for Delta's fiscal year ending June 30, 1940. Delta's records, at the end of the period, disclosed its total revenues, its cost of operation, and its in-

vested capital. Its equipment consisted of only 5 Lockheed Electra 10 passenger planes, which were supplemented for a period of 3 months by 4 reconditioned DC-2 14 passenger planes (R. 94-131).

Delta's excess profits tax for its fiscal year ending June 30, 1944 and June 30, 1945 was measured by its net income for its fiscal year 1940. In ascertaining its 1940 base period net income for its excess profits tax computations for the fiscal years 1944 and 1945, Delta did not include the $43,931.86 (R. 54). If this amount was income properly accruable in 1940, its base period net income credit would have been such that it would have had no liability for excess profits tax for its fiscal years 1944 and 1945.

The Collector of Internal Revenue, in connection with an examination of Delta's returns for the years 1944 and 1945, determined that there was a deficiency in excess profits tax for the years 1944 and 1945, which was extinguished by the application of an unused excess profits tax credit carry-back, and the application of an operating loss carry-back (R. 49). The Collector did not include the aforesaid $43,931.86 in Delta's base period net income and assessed interest on the deficiency in excess profits tax in the amount of $75,363.15, which was paid by Delta (R. 49, 50). Delta, alleging that the $43,931.86 should properly be included in base period net income, filed a claim for refund of this sum which was denied, and thereafter brought suit in the United States District Court for the Middle District of Georgia (R. 10). Judgment was entered for Delta and the Collector appealed (R. 81, 82). On Appeal, the Circuit Court of Appeals for the Fifth Circuit reversed the decision of the District Court and rendered judgment for the Collector (R. 154).

Jurisdiction of the District Court in this action is based upon Section 1340 of the Judicial Code (28 U. S. C. § 1340).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below in the instant case is in conflict with the decision of this Court in **Continental Tie & Lumber Co. v. United States**, 286 U. S. 290, which decision is controlling in this case.

That case involved the taxability of compensation payable by the United States at a rate determined by a governmental administrative agency, the Interstate Commerce Commission, to a regulated common carrier by rail pursuant to standards prescribed by an Act of Congress. That situation is identical in principle and close in factual situation to that of the instant case. There this Court held that accrual for income tax purposes did not depend upon the actual receipt of the funds by the carrier nor the date of the fixing of the exact amount payable. Instead, it held the compensation to be accruable in the year the Act of Congress became effective and in which a reasonable estimate of the amount of the payment could have been made by the carrier using the prescribed standards. There is nothing in that holding to distinguish it from the instant case. It should have been followed by the Court below as the controlling authority.

2. The decision of the Court below is based upon its decision in **Texas Trailercoach, Inc., v. Commissioner**, 251 F. 2d 395. The decision of the Court below, and that decision, are in conflict with the decision of the Court of Appeals for the 7th Circuit in **Baird v. Commissioner**, ... F. 2d ..., decided June 20, 1958, and the decision of the Court of Appeals for the 6th Circuit in **Schaeffer v. Commissioner**, ... F. 2d ..., decided August 20, 1958.

These cases involve the taxability of so-called "dealer reserves" as income to dealers in personal or real property. The number of recent cases in which this exact point has

been raised and decided attests to its currency and importance. In addition to the cases cited above, the Third, Fourth, Eighth and Ninth Circuits have handed down decisions, cited below, on the dealer reserve issue, all in conflict with the cited decisions of the Sixth and Seventh Circuits. Literally billions of dollars are involved annually in transactions giving rise to dealer reserves. A recognition of the importance of this segment of this country's economy requires that the doubt now existing as to the correct method of taxing these reserves be put to rest.

It is and must be conceded that the compensation paid Delta for the carriage in 1940 of mail should be included in its 1940 income, notwithstanding the year in which payment was received. Similarly, it is and must be conceded, on equitable grounds, that the compensation fixed by the Civil Aeronautics Board (formerly the Civil Aeronautics Authority) as fair and reasonable compensation for the carriage of mail during its base period should be a part of its base period net income for the purposes of excess profits tax. From the date of the Civil Aeronautics Authority's order instituting a proceeding to fix a rate of compensation for Delta, Delta became a contractor with the United States of America entitled to payment on a "fair and reasonable" basis. Any sums paid to it pending a decision of the Civil Aeronautics Authority were understood to be only advances or payments on account. After the final decision of the Civil Aeronautics Board, the amounts previously received were credited against the amount due, and the difference paid to Delta.

The sole question before the District Court was whether the compensation, as finally determined, was includible in Delta's base period net income.

ARGUMENT.

On the stipulations and record before it, the District Court found, as an ultimate fact, that a proper determination of Delta's excess profits credit required the inclusion of this compensation in its base period net income. **Continental Tie & Lumber Co. v. United States**, 286 U. S. 290 (1943), requires that the carrier include in income all compensation due it for the carriage of mail which might be ascertained with reasonable accuracy at the close of the fiscal period in question. Even if, for purposes of income tax, the compensation involved were not includible in 1940 income, for the purposes of the determination of whether the carrier's 1944 and 1945 income was "excessive," the determination by the Civil Aeronautics Board of proper compensation during the base period should be determinative of its base period net income.

Under both the income and excess profits tax law, accrual of an item of income may not be deferred merely because the precise amount which will be collected is uncertain. If a definite obligation exists on the part of the debtor to pay, then even though the amount ultimately to be paid be measured by a formula which requires future computation, the accrual system of accounting requires inclusion of the amount estimated to be due in income for the year in which services are rendered. **Schaeffer v. Commissioner**, ... F. 2d ...; **Baird v. Commissioner**, ... F. 2d .... To the extent that the holding of the Court below in **Texas Trailercoach, Inc., v. Commissioner**, 251 F. 2d 395, conflicts with this principle, that decision is erroneous and should be overruled.

The **Schaeffer** and **Baird** cases, from the Sixth and Seventh Circuits, respectively, as well as the **Texas Trailercoach** case, involve a factual situation very similar in principle to that under consideration here. All involve the

taxability of so-called "dealer reserves" representing a percentage withheld by finance companies from the price at which they agree to purchase commercial paper. These transactions arise when a dealer in personal property makes sales on conditional sale or title-retention contracts and assigns the evidence of indebtedness to a finance company on a discount basis. The reserve withheld by the finance company may be applied to satisfy losses and is ordinarily payable to the dealer only upon certain contingencies and only on a piecemeal basis.

The Circuits have split sharply on the question of includibility in such dealers' income of the amount held in the reserve by finance companies. As has already been noted, the Sixth and Seventh Circuits have reached a contrary conclusion to that reached by the Court below in **Texas Trailercoach, Inc., v. Commissioner**, supra, upon which is bottomed its decision here. The extreme importance of the problem is evidenced by the fact that decisions on the same point have recently been handed down by the Fourth Circuit in **Johnson v. Commissioner**, 233 F. 2d 952, the Eighth Circuit in **Glover v. Commissioner**, 253 F. 2d 7[illegible], and the Ninth Circuit in **Hansen v. Commissioner**, ... F. 2d ..., decided August 4, 1958, all reaching the same result as the **Texas Trailercoach** case. An older decision by the Third Circuit in **Keasbey & Mattison Co. v. U. S.**, 141 F. 2d 163, presents a similar holding.

The fact that no less than six decisions on this issue by Circuit Courts of Appeal have been handed down within the last three years—five of them being decided this year, together with the fact that a sharp conflict has developed between the circuits, make imperative a ruling by this Court.

We wish to emphasize the interrelation between these dealer reserve cases and the instant case. We note again

that the Court below cited its **Texas Trailercoach** decision in stating the rule regarding the proper time to accrue income. It also cited and discussed the decision of this Court in **Continental Tie & Lumber Co. v. United States**, supra, upon which we rely as the controlling authority. The Court below, however, flatly held that the rule in **Continental Tie & Lumber Co. v. United States**, supra, "requires a conclusion contrary to that for which the taxpayer contends" (Opinion, page 6). This is in glaring contrast to the decision of the Sixth Circuit in **Schaeffer v. Commissioner**, supra, where the court, in sustaining the contention of the Commissioner that the dealer reserve represented accruable income to the taxpayer, cited the **Continental Tie & Lumber Co.** case as standing for the following proposition:

> "The fact that the exact amount to be paid is not determined until a later year is not material."
>
> **Schaeffer v. Commissioner**, ... F. 2d ...

Thus it would appear that not only is there a split between the Circuits on the dealer reserve issue, an issue quite similar in principle to the question involved here, but that there is also a conflict as to the correct interpretation of this Court's ruling in **Continental Tie & Lumber Co. v. United States**, supra, which the Court below relied upon heavily in its decision and which is factually almost on all fours with the instant situation. For this additional reason, certiorari should be granted.

Notwithstanding any of these decisions, however, proper accounting methods required the inclusion by Delta in its 1940 income of its receipts from the carriage of mail during this period, in the amount finally determined. Inclusion of the entire amount of mail pay due to Delta for the year 1940 in its 1940 net income properly reflected its base period net income for purposes of excess profits tax, and met the test fixed by the Internal Revenue Code of "proper accounting" [Section 42 (a) Internal Revenue

Code, 1939]. Delta consistently kept its books on the accrual method, including in income each month the amount of mail pay attributable to the carriage of mail during that month, regardless of the month or year in which payment was received. Upon the passage of the Civil Aeronautics Act, all payments to it became "payments on account", the Act fixing, as a matter of law, Delta's right to receive fair and reasonable compensation for its carriage of mail by air. From the date that the Civil Aeronautics Authority (later the Civil Aeronautics Board) notified Delta of its intention to determine the amount of its compensation, both the carrier and the Postmaster General were on notice that all sums received were payments on account. Delta's records were kept in accordance with regulations promulgated by the Civil Aeronautics Authority, and clearly reflected its total income, its investment, its non-mail revenue, and its revenue from mail receipts. No dispute existed with respect to any of the items entering into a determination of fair and reasonable compensation between Delta and the Postmaster General, nor was any issue raised or discussed with respect to these. Under these circumstances, in order to determine fair and reasonable compensation for the year ending June 30, 1940, all that was required was a simple computation as to the amount necessary to break even and return the standard 8% on Delta's investment.

In the absence of the recent **Texas Trailercoach** ruling, it seems apparent that the Court below would have found no difficulty in applying the rule in **Continental Tie & Lumber Co. v. United States**, supra, to this case so as to affirm the ruling of the District Court. The attempt of the Court below to distinguish the **Continental Tie & Lumber Co.** case by referring to the decision of this Court in **Delta Air Lines v. Summerfield**, 347 U. S. 74, is astonishing. The court stated that Section 406 (b) of the Civil Aeronautics Act of 1938 included factors in its rate fixing formula that

"could not have been determined by the taxpayer from its books and records" and categorically stated that "any doubt as to this will be dispelled by an examination of the opinion in **Delta Air Lines v. Summerfield** . . ." (Opinion, p. 6). The latter case held that the Civil Aeronautics Board erred, in applying the formula outlined in Section 406 (b) of the Act by separating the international from the domestic operations of the carrier in determining its "need" for compensation. Aside from the fact that the opinion in that case lends virtually no support to the statement of the Court below as to the factors contained in Section 406 (b), the case is wholly inapposite to our situation on its facts. Delta Air Lines during 1940 was a tiny domestic air carrier with a maximum of nine planes flying only two routes. Here there was no such complex problem as was presented by the situation in the **Summerfield** case where foreign as well as domestic operations were involved covering a multitude of routes over many thousands of miles.

Far from supporting the holding of the court below, we feel that the **Summerfield** case, if it has any significance here, supports the holding of the District Court, which was reversed by the decision under review. The **Summerfield** case would seem to indicate that, even in the case of a large international air carrier, the rate of mail pay is determined principally from financial data found in the books and records of the carrier. Nothing in that opinion indicates that any other factor was considered by the Board.

Basically, this case has already been decided by this court in **Continental Tie & Lumber Co. v. United States**, *supra*. There this court noted the argument of the Government in favor of accruing compensation before the award was either paid or computed:

> ". . . The Government insists that while adjustments or settlements of principles by the Commission

might vary the amount to be awarded, the petitioner's case presented problems not differing from those confronting many business concerns which keep accounts on an accrual basis and have to estimate for the tax year the amount to be received on transactions undoubtedly allocable to such year. Admitting there might be differences and discrepancies between the railway's estimate and the amount awarded by the Commission, these, says the Government, could, as in similar cases, have been adjusted by an additional assessment or a claim for refund after final determination of the amount due."

After noting all of the various factors tending to make inaccurate any estimate by the carrier prior to the decision by the Commission, this court found in favor of the Government stating:

"... But in spite of these inherent difficulties we think it was possible for a carrier to ascertain with reasonable accuracy the amount of the award to be paid by the Government. Subsequent to its order of June 10, 1920, the Commission made no amendment or alteration of the rules with respect to the information to be furnished under ¶ 204. Obviously the data had to be obtained from the railway's books and accounts and from entries therein all made prior to March 1, 1920. These accounts contained all the information that could ever be available touching relevant expenditures. . . . The petitioner was promptly informed by the terms of ¶ 209 as supplemented by the instructions issued by the Commission of the method to be followed in allocating charges to operation during periods under inquiry. It does not appear that a proper effort would not have obtained a result approximately in accord with what the Commission ultimately found."

This is the exact result called for in this case. The failure of the Court below to follow the clear ruling in the **Continental Tie & Lumber Co.** case demands that this Court grant the petition for certiorari.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES N. FRAZER,

RICHARD S. MAURER,

WILLIAM LINKOUS, JR.,

ELLIOTT GOLDSTEIN,
Attorneys for Petitioner.

Of Counsel:

POWELL, GOLDSTEIN, FRAZER & MURPHY,
1130 Citizens & Southern National Bank Building,
Atlanta 3, Georgia.

September, 1958.

APPENDIX.

Opinion.

United States of America,

v.

Delta Air Lines, Inc.

No. 16868.

United States Court of Appeals
Fifth Circuit.

May 23, 1958.

Rehearing Denied June 24, 1958.

Action by taxpayer for refund of interest paid on excess profits tax deficiencies. The United States District Court for the Middle District of Georgia, T. Hoyt Davis, Chief Judge, entered judgment for taxpayer and the government appealed. The Court of Appeals, Jones, Circuit Judge, held that where amount of additional mail transportation pay for taxpayer for a fiscal year ending June 30, 1940, received by taxpayer during its fiscal year ending June 30, 1942, was not an amount which could have been ascertained by taxpayer with reasonable accuracy in 1940, and could not have been determined by taxpayer from its books and records in 1940, such amount was not properly accruable in taxpayer's fiscal year 1940 for excess profits tax purposes.

Reversed and rendered.

John N. Stull, Acting Asst. Atty. Gen., Lee A. Jackson, J. Henry Kutz, Attys., Washington, D. C., Charles K. Rice, Asst. Atty. Gen., Sheldon I. Fink, Atty., Floyd M. Buford, Asst. U. S. Atty., Washington, D. C. (Frank O. Evans,

U. S. Atty., Jack J. Gautier, Asst. U. S. Atty., Macon, Ga., on the brief), for appellant.

James N. Frazer, Elliott Goldstein, Atlanta, Ga., Richard S. Maurer, William Linkous, Jr., Atlanta, Ga., Attys., Powell, Goldstein, Frazer & Murphy, Atlanta, Ga., of counsel, for appellee.

Before Jones, Brown and Wisdom, Circuit Judges.

Jones, Circuit Judge.

The appellee, Delta Air Lines, Inc., here sometimes called Delta, is an air carrier of passengers, freight and mail. It operated Route 24 between Texas and South Carolina, serving points in those states and in those lying between them. Over this route Delta transported mail under a contract with the Postmaster General. The Interstate Commerce Commission fixed a rate of 29 cents per airplane mile for transporting a mail load not exceeding 300 pounds with a base mileage of 105,000 miles per month. The Civil Aeronautics Act of 1938, 52 Stat. 977, 49 U. S. C. A., § 401 et seq., was enacted in June of that year. Delta was issued a Certificate of Public Convenience and Necessity by the Civil Aeronautics Authority, here sometimes called the C. A. A. Section 405 (a) of the Act provided that prior contracts for mail carriage should be continued on conditions there provided and that the Postmaster General should make payments at the contract rate or the rate fixed by the Interstate Commerce Commission. Under authorizing provisions of the Act[1] the C. A. A., on Decem-

[1] "(a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency

ber 1, 1939, instituted upon its own initiative a proceeding to determine whether the compensation being paid to Delta for transporting mail was fair and reasonable. During the pendency of this proceeding Delta received payment for mail carriage at the 29 cent pay-mile rate.[2] Delta filed its Federal income tax returns on an accrual basis. During the period of the mail rate proceeding Delta accrued and paid tax on its mail transportation earnings at the 29 cent rate.

On January 29, 1942, the Civil Aeronautics Board, hereinafter called the C. A. B., successor to the C. A. A., promulgated

arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

"(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the national defense." 49 U. S. C. A. 480.

[2] The compensation actually received by Delta for 1940, the crucial year in this controversy, was 29.10 cents per pay-mile due to the operation of more than the monthly base mileage of 105,000 miles.

an order fixing a mail rate for Delta of 31 cents per pay-mile for the period beginning December 1, 1939, and terminating July 14, 1941. The amount of additional mail transportation pay of Delta for its fiscal year ending June 30, 1940, was $43,931.86. This amount was received by Delta during its fiscal year ending June 30, 1942, and was included as income by Delta in its income tax return for that year. Delta's excess profits tax for its fiscal years ending June 30, 1944 and 1945, was measured by its net income for its fiscal year 1940. In ascertaining its 1940 base period net income for its excess profits tax computations for the fiscal years 1944 and 1945, Delta did not include the $43,931.86. If this amount was income properly accruable in 1940, its base period net income credit would be such that it would have had no excess profits tax for its fiscal years 1944 and 1945. Conversely, if the amount was not properly accruable in Delta's fiscal year 1940, then excess profits tax deficiencies existed for the fiscal years 1944 and 1945, and such deficiencies were interest bearing. If there were deficiencies for excess profits taxes for the two years, 1944 and 1945, the liability for taxes was extinguished by loss carrybacks from subsequent years, leaving the interest obligation remaining.[3] This interest, with interest thereon, in the aggregate amount of $75,363.15, was paid by Delta to the Collector of Internal Revenue. After claims for refund were filed and denied, Delta brought a suit seeking a refund of the amount of its payment. The District Court held that the pay for the fiscal year 1940 mail transportation should be accrued as 1940 income for computing base period net income for excess profits tax purposes.[4] Judgment was entered for Delta. The United States has appealed.

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[3] Manning v. Seeley Tube & Box Co., 338 U. S. 561, 70 S. Ct. 386, 94 L. Ed. 346; United States v. Koppers Co., Inc., 348 U. S. 254, 75 S. Ct. 268, 99 L. Ed. 302.

[4] Delta Air Lines v. Edwards, D. C., 150 F. Supp. 589.

Basically, "It is the right to receive and not the actual receipt that determines the inclusion of the amount in gross income.", Spring City Foundry Co. v. Commissioner, 292 U. S. 182, 54 S. Ct. 644, 645, 78 L. Ed. 1200. In other words it has been stated. "The uniform result has been denial both to government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, or the obligation to pay, has become final and definite in amount." Security Flour Mills Co. v. Commissioner, 321 U. S. 281, 64 S. Ct. 596, 599, 88 L. Ed. 725. See Dixie Pine Products Co. v. Commissioner, 320 U. S. 516, 64 S. Ct. 364, 88 L. Ed. 429; Texas Trailercoach, Inc. v. Commissioner, 5 Cir., 1958, 251 F. 2d 395.

The District Court based its decision primarily upon the precedent of Continental Tie & Lumber Co. v. United States, 286 U. S. 290, 52 S. Ct. 529, 76 L. Ed. 1111. There it was held that where the taxpayer has in its own books and accounts all of the data required to ascertain with reasonable accuracy the amount that would be paid, that amount should be accrued during the year in which the right was fixed. The doctrine of the Continental Tie case has been thus stated:

> "* * * income may not be deferred after the right matures, even although the ministerial act of computing the amount occurs in the subsequent year, and this although the administrative procedure to ascertain the amount to be paid is that of a public commission." Dally v. Commissioner, 9 Cir., 1955, 227 F. 2d 724, 726. See Irwin v. Commissioner, 3 Cir., 1956, 238 F. 2d 874; Midwest Motor Express, Inc., v. Commissioner, 8 Cir., 1958, 251 F. 2d 405.

The determination to be made under 49 U. S. C. A., § 486, was not one which could have been ascertained by the tax-

payer with any reasonable accuracy. Factors are included in Section 486 (b) which could not have been determined by the taxpayer from its books and records. Any doubt as to this will be dispelled by an examination of the opinion in Delta Air Lines v. Summerfield, 347 U. S. 74, 74 S. Ct. 350, 98 L. Ed. 513, rehearing denied 347 U. S. 74, 74 S. Ct. 512, 98 L. Ed. 1078, where the Supreme Court affirmed the District of Columbia Court of Appeals in its reversal of a Civil Aeronautics Board order in which the Board had misconstrued the formula set forth in Section 486 (b). The case involved the taxpayer's foreign operations. The rule stated in Continental Tie & Lumber Co. v. United States, supra, requires a conclusion contrary to that for which the taxpayer contends.

The judgment of the District Court is here reversed and rendered for the United States.

Reversed and rendered.

Judgment.

Extract from the Minutes of May 23, 1958.

United States of America,

versus

Delta Air Lines, Inc.

No. 16868.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and rendered for the United States.

Internal Revenue Code (1939):

Sec. 41. General Rule.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in Section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

Sec. 42. Period in Which Items of Gross Income Included.

(a) General Rule. The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death.

SEC. 727. **Exempt Corporations.**

The following corporations, except a member of an affiliated group of corporations filing consolidated returns under section 141 (I. R. C. 1939), shall be exempt from the tax imposed by this subchapter:

* * *

(h) Any corporation subject to the provisions of Title IV of the Civil Aeronautics Act of 1938, in the gross income of which for any taxable year beginning after December 31, 1939, there is includible compensation received from the United States for the transportation of mail by aircraft if, after excluding from its gross income such compensation, its adjusted excess profits net income for such year is zero or less. Such exclusion from gross income for such year shall also be made in computing the unused excess profits credit adjustment for any other taxable year, but only for the purpose of determining whether the corporation is exempted by this subsection from the tax imposed by this chapter for such other taxable year.

The Civil Aeronautics Act of 1938:

Section 405 (a)—52 Stat. 994, 49 U. S. C. 485.

Each contract between the United States and any person for the carriage of mail entered into or continued under the provisions of the Air Mail Act of 1934, as amended, and each contract for the carriage of mail by aircraft in Alaska, shall be continued in effect until canceled in accordance with this subsection. Each such contract shall be canceled upon the issuance to the holder of such contract of a certificate of public convenience and necessity authorizing the transportation of mail by aircraft between the points covered by such contract, or upon the failure of the holder

of such contract to apply for such certificate within one hundred and twenty days after the date of enactment of this act, or upon a determination by the Authority that such certificate should not be issued. Until the Authority fixes rates under Section 406 of this Act the Postmaster General shall pay compensation for the transportation of mail by aircraft at the rates provided by each such contract or, where rates have been heretofore or shall hereafter be fixed by orders of the Interstate Commerce Commission, pursuant to proceedings instituted prior to the date of enactment of this Act, shall pay compensation for such transportation in accordance with such orders as if this Act had not been enacted.

Section 406—52 Stat. 994, 49 U. S. C. 486.

(a) The Authority is empowered and directed, upon its own initiative or upon a petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so

fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. * * *

Certificate of Service.

I certify that I have served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit pursuant to the terms of paragraphs 1 and 2 of Rule 33 of the Revised Rules of the Supreme Court of the United States by depositing a copy thereof in a United States post office with air-mail postage prepaid and ad-

dressed to the Solicitor General, Department of Justice, Washington 25, D. C., and by depositing a copy thereof in a United States post office with air mail postage prepaid and addressed to Mr. Frank O. Evans, U. S. Attorney, Post Office Building, Macon, Georgia, attorney for respondent herein.

This September ....., 1958.

.....

James N. Frazer,

Of Counsel for Petitioner.